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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. BERNARD BRINKLEY, Defendant and Appellant.	B205446 (Los Angeles County Super. Ct. No. ZM 004182)

APPEAL from an order of the Superior Court of Los Angeles County, Rafael A. Ongkeko, Judge. Affirmed.

Jean Matulis, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Sarah J. Farhat and Stephanie C. Brenan, Deputy Attorneys General, for Plaintiff and Respondent.

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Bernard Brinkley appeals an order denying his petition for conditional release under Welfare and Institutions Code section 6608.[1] Appellant contends the order must be reversed because (1) the trial court erred in ruling that he was barred from seeking an unconditional release under the Sexually Violent Predator Act (SVPA) (§ 6600 et seq.); (2) the 2006 amendments to the SVPA violate due process; and (3) the trial court used the wrong standard when it denied his request for conditional release under section 6608. We do not agree with any of these contentions and conclude that the trial court's order is supported by substantial evidence. We therefore affirm the order.

THE APPLICABLE STATUTES

On September 20, 2006, the Governor signed Senate Bill No. 1128, the Sex Offender Punishment, Control, and Containment Act of 2006. (Stats. 2006, ch. 337, § 1.) A few months later, on November 7, 2006, voters approved Proposition 83. These measures amended portions of the SVPA.[2] Senate Bill No. 1128 became effective when it was signed by the Governor on September 20, 2006. Proposition 83 became effective on November 8, 2006, the day after it was approved by voters.

Subdivision (b) of section 6605, as amended in 2006 both by the Legislature and under Proposition 83, provides that, if the Department of Mental Health determines that either (a) the committed person's condition has so changed that the person no longer meets the definition of a sexually violent predator, or (b) conditional release to a less restrictive alternative is in the person's best interest and conditions can be imposed that adequately protect the community, the Director of Mental Health must authorize the

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1 All statutory references are to the Welfare and Institutions Code.

2 "Proposition 83, passed by the voters in November of 2006, modified the terms by which sexually violent predators (SVP's) can be released from civil commitment under the Sexually Violent Predators Act . . . . In essence, it changes the commitment from a two-year term, renewable only if the People prove to a jury beyond a reasonable doubt that the individual still meets the definition of an SVP, to an indefinite commitment from which the individual can be released if he proves by a preponderance of the evidence that he no longer is an SVP." (*People v. McKee* (2010) 47 Cal.4th 1172, 1183-1184 (*McKee*).)

person to petition the court for conditional release to a less restrictive alternative or for an unconditional discharge. The petition must be filed with the court and served on the prosecuting agency responsible for the initial commitment.[3]

Section 6608 expressly recognizes that a person may petition for conditional release or an unconditional discharge *without* the director's recommendation or concurrence.[4]

At the section 6608 hearing, the court determines whether the committed person would be a danger to the health and safety of others if he is placed under supervision and treatment in the community." (§ 6608, subd. (d).)[5] In proceedings under section 6608, the petitioner has the burden of proof and must show by a preponderance of the evidence that he is no longer dangerous. (§ 6608, subd. (i).)

PROCEDURAL HISTORY

Between 1976 and 1983, appellant sexually assaulted four women. On December 13, 2005, after a jury trial, appellant was committed to the Department of

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[3] Section 6605, subdivision (b) provides in relevant part: "If the State Department of Mental Health determines that either: (1) the person's condition has so changed that the person no longer meets the definition of a sexually violent predator, or (2) conditional release to a less restrictive alternative is in the best interest of the person and conditions can be imposed that adequately protect the community, the director shall authorize the person to petition the court for conditional release to a less restrictive alternative or for an unconditional discharge."

[4] Section 6608, subdivision (a) provides in relevant part: "Nothing in this article shall prohibit the person who has been committed as a sexually violent predator from petitioning the court for conditional release or an unconditional discharge without the recommendation or concurrence of the Director of Mental Health."

[5] Section 6608, subdivision (d), provides in relevant part: "The court shall hold a hearing to determine whether the person committed would be a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior due to his or her diagnosed mental disorder if under supervision and treatment in the community. If the court at the hearing determines that the committed person would not be a danger to others due to his or her diagnosed mental disorder while under supervision and treatment in the community, the court shall order the committed person placed with an appropriate forensic conditional release program operated by the state for one year."

Mental Health for two years under the SVPA. This commitment was affirmed in *People v. Brinkley*, B189142, filed November 27, 2007 (nonpub. opn.).

On October 13, 2006, after Senate Bill No. 1128 became effective but before Proposition 83 was approved, appellant received his annual written notice to petition the court for conditional release under section 6608, as required by section 6605, former subdivision (b).[6] On the same day, appellant requested a hearing to determine whether his condition had changed sufficiently that he could be released without endangering the health and safety of others. Evidently, no hearing took place between October 13, 2006, and November 8, 2006, when Proposition 83 went into effect.

In November 2006, two psychologists evaluated appellant in preparation for his annual review. In the first report, Dr. Adams concluded appellant did not pose a risk to the health and safety of others and was not likely to reoffend; however, the second psychologist, Dr. Dern, disagreed and determined appellant would continue to pose a risk if released. On January 5, 2007, Erica Weinstein, the acting medical director of the Department of Mental Health at Coalinga State Hospital, sent a letter to the trial court indicating the department agreed with Dr. Dern and felt appellant continued to pose a risk if released.

In light of the enactment of Senate Bill No. 1128 and Proposition 83, in August 2007 both sides filed motions to determine which version of the SVPA should be applied at the annual review hearing. Appellant argued the court should apply the SVPA as it existed prior to Proposition 83 and allow him to petition for release under section 6605, former subdivision (b) without approval from the director because he was committed in

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6 Section 6605, former subdivision (b), provided in relevant part: "The director shall provide the committed person with an annual written notice of his or her right to petition the court for conditional release under Section 6608. . . . The director shall forward the notice and waiver form to the court with the annual report. If the person does not affirmatively waive his or her right to petition the court for conditional release, the court shall set a show cause hearing to determine whether facts exist that warrant a hearing on whether the person's condition has so changed that he or she would not be a danger to the health and safety of others if discharged."

December 2005 and had requested an order to show cause hearing on October 13, 2006, prior to voter approval of Proposition 83. The People, on the other hand, argued the amended SVPA should apply because appellant's annual review hearing was scheduled for December 2006, after the new law took effect.

On August 30, 2007, the court granted the People's motion to apply the SVPA as amended by Proposition 83.

On October 11, 2007, appellant filed a petition for conditional release under section 6608.

Later that month, Dr. J. Singh, who was then acting as medical director at the Coalinga State Hospital, sent a letter to the court indicating he agreed with Dr. Weinstein's previous findings that appellant would pose a risk if released.

THE EVIDENCE PRESENTED DURING THE SECTION 6608 HEARING

1. Testimony of Jane Adams, Ph.D.

In November 2006, Dr. Adams was appointed by the Department of Mental Health to evaluate appellant for his annual review. She interviewed appellant on November 16, 2006. Dr. Adams concluded appellant would not pose a risk to the health and safety of others if released and was unlikely to engage in sexually violent criminal behavior. She diagnosed appellant as suffering from alcohol and cocaine dependence and antisocial personality disorder.

Dr. Adams's study of appellant revealed some disturbing facts. As to the risk of reoffense, Dr. Adams acknowledged that under "Static-99," which is the most useful tool in predicting risk, the recidivism risk was 52 percent, which Dr. Adams stated was very high. On the other hand, Dr. Adams thought that Static-99 over-predicts recidivism rates for older people; factoring in his age, Dr. Adams concluded the risk was 12 percent. Dr. Adams also noted that appellant had scored in the severe range of pyschopathy and that he had psychopathic traits. Dr. Adams noted that appellant had a pattern of sexually reoffending within 12 months of release from confinement.

Dr. Adams was also concerned that appellant had not engaged in or completed treatment for sexual offenses and she thought that he was unlikely to voluntarily seek sex

offender specific treatment in the community. Dr. Adams was also worried about appellant's history of poor cooperation with supervision and placing himself in high risk situations.

Factors that favored appellant, on the other hand, were that appellant was almost 55 years old and had significant medical issues that reduced his ability to engage in the types of crimes he had committed. Additionally, Dr. Adams noted that appellant had participated in treatment for his substance abuse problems and he did not seem to express attitudes tolerant of sexual assault, which he had previously held. Dr. Adams also observed appellant had a history of significant time in the community (five years) without sexually offending. (This conflicts with Dr. Adams's earlier finding that appellant has a pattern of reoffending every 12 months.) She said appellant did not suffer from paraphilia.[7]

2. Testimony of Tracy Dern, Ph.D.

After receiving Dr. Adams's report, the Department of Mental Health appointed Dr. Dern to conduct a second review of appellant. In her report dated November 28, 2006, Dr. Dern agreed with Dr. Adams's diagnosis of alcohol and cocaine dependence and antisocial personality disorder. However, Dr. Dern also diagnosed appellant with paraphilia based on the fact he sexually assaulted multiple women, which she felt was "clear evidence that he has recurrent intense sexually arousing fantasies, and urges or behaviors involving nonconsenting partners." Dr. Dern concluded appellant continued to pose a danger to the health and safety of others and was likely to reoffend if released.[8]

Dr. Dern was particularly concerned about appellant's lack of sex offender specific treatment and his poor attendance in other treatment programs he had

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[7] To be diagnosed with paraphilia there must be some indication that the lack of consent itself was arousing to the individual. According to Dr. Adams, only 2 to 5 percent of rapists would qualify as having paraphilia.

[8] Dr. Dern requested an interview with appellant but he refused. Her evaluation was based entirely on information contained in appellant's file and interviews with hospital staff members.

participated in. Without sex offender specific treatment, according to Dr. Dern, appellant's symptoms had not been managed or addressed, which meant that he remained a danger to others.

Dr. Dern specifically recommended against a conditional release. She justified this recommendation by a number of facts and circumstances. Appellant was in need of more direct supervision in that he had failed to cooperate with the staff, he had difficulty in controlling his verbal aggression, he was intimidating, he failed to follow rules and instructions, he had been found with a pornographic DVD, and he was not likely to attend any sex offender specific treatment in the community.

Dr. Dern did not believe that either appellant's age or the condition of his health would prevent him from committing a rape.

3. Testimony of William Ellis

Mr. Ellis is a Behavior Specialist II at Coalinga State hospital. He facilitated numerous treatment groups that appellant participated in, including substance abuse, stages of change and managing anger. He testified appellant was active in the groups and showed a lot of understanding.

4. Testimony of William Gordon, Ph.D.

Dr. Gordon was in the process of getting licensed as a staff psychologist at Coalinga State Hospital where he conducted several treatment groups that appellant participated in. Dr. Gordon said appellant spoke of his history of substance abuse in a very open and frank manner. He felt appellant was an asset to the group because he was always prepared and had things to discuss.

Further, Dr. Gordon testified the skills appellant learned in his treatment could be applied toward sex offenses, although the treatment was not specifically geared toward those offenses.

5. Appellant's Testimony

Appellant testified that while in prison, he was involved in an incident where he was threatened and assaulted in the shower, which resulted in a cut to the head. While he did not equate the assault on him to his sexual offenses, he said it helped him learn

empathy and he realized the pain he had experienced was the same that he had caused his victims.

Appellant also explained that while incarcerated, one of his daughters was sexually assaulted. He said after talking with her about her experience and understanding how she felt, he realized he could never take advantage of or force himself on a woman again. Appellant said he realized that the victims of his crimes were living the rest of their lives with the shame of having been raped and that it also affected their families.

If released appellant said he could count on his family for support.

6. Testimony of Brenda Brinkley

Appellant and Brenda Brinkley were married for 17 years and had three children together. She has noticed changes for the better in appellant; he is more concerned about other people's well-being than before. He keeps in touch with the children and she intends to remarry him once he is released. She did acknowledge that appellant had a drug abuse problem.

THE TRIAL COURT'S RULING

The court denied appellant's petition on December 12, 2007. In its order, the court explained that the process for a section 6608 petition was different from a section 6605 hearing because in a section 6608 hearing the court does not need to consider whether the SVP *currently* meets the definition of a SVP. The court observed that under section 6608 the SVP remains under an SVP commitment, albeit placed in the community, while under section 6605 the SVP can be unconditionally discharged from commitment.

The court noted that under section 6608, the burden is shifted to the SVP "to prove that, *despite* his diagnosed mental disorder, he is not dangerous, not likely to reoffend and may be placed in a conditional release program." The court ruled that "the jury's previous verdict sets a 'datum of mental disorder and dangerousness' [citation] to establish a baseline of whether 'anything had changed' since the jury's verdict." The court accepted the jury's finding that appellant was an SVP and the only issue to be

decided was whether appellant had proven he was not likely to reoffend while on conditional release.

According to the court, appellant had not met this burden because there was no evidence of significant changes in his treatment program since his commitment when the jury considered and rejected the issue of his release. The court observed appellant had focused his treatment on his substance abuse problems but rejected sex offender specific treatment.[9] The court also concluded that appellant had not shown that his condition had changed sufficiently to warrant the conclusion that he posed less of a risk than when originally committed.

As noted, the court denied appellant's petition.

DISCUSSION

1. The Application of a Proposition 83 Amendment to This Case Is Not Retroactive

Appellant contends that because he was committed in December 2005, he has a right to have pre-Proposition 83 law applied to his case. Specifically, he claims that he has a right to request unconditional discharge without the Director of Mental Health's approval, as he had that right prior to Proposition 83.

It is true that up to and until November 8, 2006, there was no provision for the director's approval of a section 6605 petition. After the effective date of Proposition 83, the director's approval certainly plays an important role in a section 6605 petition. But this does not mean, as appellant suggests, that post-Proposition 83 the director's approval is required for a petition for an unconditional discharge. As we have seen, subdivision (a) of section 6608 specifically recognizes that a person may petition for an unconditional discharge *without* the director's recommendation or concurrence. (See fn. 4, *ante*.)

We do not agree with appellant that the trial court concluded that section 6605 was not applicable. The trial court's written order cites the provision of subdivision (a) of

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9 At the time this petition was heard, appellant's two-year commitment period had almost expired and there was a recommitment petition pending that would require re-evaluation of appellant's SVP status.

section 6608, which preserves the right to file a petition for a discharge without the director's approval. While it is true that in the hearing the trial court made a passing remark that, in light of the director's position, a section 6605 "petition would not be appropriate here," this does not amount to a statement that appellant had no right to file such a petition.

As appellant correctly notes, statutes generally operate prospectively. (E.g., *People v. Whaley* (2008) 160 Cal.App.4th 779, 793-794.) Thus, there is no question that, when appellant filed his section 6608 petition in October 2007, sections 6605 and 6608, *as amended in 2006*, applied to his petition.

The question is whether this new procedural rule (director's approval) cannot be applied because appellant was originally committed prior to the effective date of Proposition 83. "There is no vested right in existing remedies and rules of procedure and evidence. Hence, generally speaking, the Legislature may change these rules and make the changes apply retroactively to causes of action or rights that accrued prior to the change. [Citations.]" (7 Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law, § 630, p. 1028.) Even assuming that appellant's right to request a section 6605 hearing accrued when he was originally committed, it appears that the new procedural rule calling for the director's approval can be applied to appellant's request. But we do not think his right to petition for a section 6605 hearing accrued when he was originally committed. Under section 6605, as well as section 6608, the right to a hearing accrues once a year in each year of the commitment.

In short, the director's approval as an aspect for a section 6605 hearing *in 2007* is not the retroactive application of Proposition 83.

The important point is that appellant could have, but did not, file a petition under section 6605, choosing instead to petition under section 6608. The trial court addressed and resolved that petition.

2. Proposition 83 Does Not Violate Due Process

Appellant contends that the indefinite commitment term imposed by the amended SVPA violates due process for various reasons detailed below.

McKee rejected a number of due process challenges to the SVPA.

"There is no question that civil commitment itself is constitutional so long as it is accompanied by the appropriate constitutional protections." (*McKee*, *supra*, 47 Cal.4th at p. 1188.) *McKee* rejected the argument that an indeterminate confinement is constitutionally unsound. Specifically, the court noted the safeguard that, under the post-Proposition 83 SVPA, a person may file a petition for release as early as one year after the previous petition was denied. (*McKee*, at p. 1191.)

Appellant claims that the court's power to deny a section 6608 petition as frivolous without a hearing renders the right to file a petition under section 6608 meaningless. "McKee contends that the court's discretion to deny a petition without a hearing as frivolous denies due process. We disagree. A frivolous petition is one that 'indisputably has no merit.' [Citation.] McKee cites no authority for the proposition that due process is violated by not granting such petitions a hearing. The fact that the statute gives the court the authority to deny such petitions does not, of itself, serve as an obstacle to the primary due process goal of ensuring that only those individuals who continue to meet SVP criteria will remain involuntarily committed." (*McKee*, *supra*, 47 Cal.4th at p. 1192.)

Appellant also claims that he has no right to the appointment of an expert. "After Proposition 83, it is still the case that an individual may not be held in civil commitment when he or she no longer meets the requisites of such commitment. An SVP may be held, as the United States Supreme Court stated under similar circumstances, 'as long as he is both mentally ill and dangerous, but no longer.' [Citation.] Given that the denial of access to expert opinion when an indigent individual petitions on his or her own to be released may pose a significant obstacle to ensuring that only those meeting SVP commitment criteria remain committed, we construe section 6608, subdivision (a), read in conjunction with section 6605, subdivision (a), to mandate appointment of an expert for an indigent SVP who petitions the court for release." (*McKee*, *supra*, 47 Cal.4th at p. 1193.)

In short, *McKee* disposes of appellant's due process challenges.

3. The Trial Court Applied the Appropriate Standard When It Denied Appellant's Petition for Conditional Release Under Section 6608

Appellant contends that the trial court erred when it "narrowly construed section 6608 to require consideration only of whether he was likely to reoffend in a conditional release program." Appellant contends that the court should have determined whether appellant "met the commitment criteria."

The trial court did not construe section 6608 narrowly, it construed it correctly. On its face, section 6608 requires the trial court to determine whether it is likely that the petitioner will engage in sexually violent behavior while under supervision and treatment in the community. (See fn. 5, *ante*.) This is the only issue under section 6608. No more needs to be said on this score.

Whether the court's order denying the petition should be affirmed depends upon whether the order is supported by substantial evidence. (*People v. Rasmuson* (2006) 145 Cal.App.4th 1487, 1504.)

There is such substantial evidence in this case. In large part, that evidence is the testimony of Dr. Dern, which makes it clear that appellant continues to constitute a danger. One would think that it is hardly necessary to go beyond the fact that appellant has chosen not to participate in treatment for his sexual offenses. Yet, there is far more that indicates that he continues to pose a danger. His failure to conform to rules and regulations, his aggressiveness and possession of pornographic materials are some additional factors that support the trial court's ruling. It is worth noting that not even Dr. Adams, who supported appellant's case, gave him a clean bill of health.

DISPOSITION

For the reasons set forth above, the judgment (order) is affirmed.

FLIER, J.

We concur:

RUBIN, Acting P. J.

GRIMES, J.